



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Communications by Johnson, Inc.

File: B-255473

Date: March 2, 1994

Richard C. Gering, Esq., Arnstein & Lehr, for the protester, William E. Thomas, Jr., Esq., Paul Grabelle, Esq., and Philip Kaufman, Esq., Department of Veterans Affairs, for the agency.

Behn Miller, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's rejection of protester's bid bond was reasonable where the bidder's intended individual surety did not pledge sufficient assets to indemnify the government for the required bid bond amount.

DECISION

Communications by Johnson, Inc. protests the rejection of its proposal and the award of a contract to American Telecom Corporation under request for proposals (RFP) No. 548-02-93, issued by the Department of Veterans Affairs (VA) to install a telecommunications system at the VA Medical Center in West Palm Beach, Florida. The VA rejected Johnson's proposal because the agency determined that the firm's bid bond was ambiguous as to the identity of the individual surety, and because the apparently intended individual surety failed to pledge adequate security. Johnson contends that the VA improperly determined its bid bond to be deficient.

We deny the protest.

The RFP required offerors to furnish a contract guarantee--analogous to a bid guarantee--in the amount of at least 20 percent of the offeror's proposed contract price. Offerors were directed to submit their contract guarantee in the form of a "firm commitment"--which the solicitation described as "a bid bond, postal money order, certified check, irrevocable letter of credit, [as well as] certain bonds or notes of the United States." If an offeror intended to submit a bid bond, a blank copy of standard form (SF) 24, "BID BOND," was included in the solicitation package for this purpose.

By the July 22, 1993, closing date, two proposals--Johnson's and American Telecom's--were received. To satisfy the contract guarantee requirement, Johnson initially submitted a properly executed SF 24 bid bond which identified International Fidelity Insurance Company as its corporate surety. However, when Johnson submitted its best and final offer (BAFO) on August 25, the firm submitted a new SF 24 which contained the following description in the "SURETY(IES)" blank of the bid bond form:

"Imperial Surety Services, Inc., as Attorney-in-Fact for 'Individual Surety' Keith B. Faber"

The "INDIVIDUAL SURETY(IES)" signature blanks set forth at the bottom of the SF 24 showed two signatures with the following corresponding identifications: "1. Don DeSanti, President as Attorney-in-Fact" and "2. Keith B. Faber, Individual Surety." Included with the bid bond was an executed "POWER OF ATTORNEY AD-LITEM" which was signed by Keith B. Faber, as "INDIVIDUAL SURETY," and which provided in relevant part that:

". . . I, Keith B. Faber, . . . do make and appoint Imperial Surety Services, Inc., an Arizona corporation, my lawful Attorney-in-Fact for the following purpose and this purpose only:

"To sign the attached [SF 24] undertaking approved and executed by me. For the specific project or contract, identified and described as follows:

". . . RFP [No.] 548-02-93. . . ."

The contracting officer determined that Johnson's new bid bond was deficient since she was uncertain from the surety identification language set forth above whether the actual surety was Imperial Insurance or Keith B. Faber. The contracting officer also found the bid bond deficient since there was no accompanying description of the real property purportedly offered to secure the surety's obligation. Consequently, the contracting officer decided to conduct another round of discussions with all offerors so that Johnson could remedy its bid bond deficiencies, as required by Federal Acquisition Regulation (FAR) § 28.101-4(b).

By letter dated September 7, the contracting officer provided Johnson with a detailed analysis of the perceived deficiencies in its bid bond. In addition to questioning the identity of the intended surety, the contracting officer advised Johnson that Imperial Insurance would not be an acceptable corporate surety since the corporation was not listed on Department of Treasury Circular 570 as an

approved corporate surety. The contracting officer also advised Johnson that the agency had questions about the enforceability of the power of attorney document, purportedly authorizing Imperial to act on behalf of Mr. Faber. Finally, the contracting officer advised Johnson that if the firm intended to utilize an individual surety--such as Mr. Faber--to secure its bid bond obligation, the SF 24 would have to be singularly executed by Mr. Faber.

To the extent Johnson's individual surety proposed real property as collateral for the bid bond, the contracting officer also advised the firm that the bid bond must be accompanied by all necessary documentation required by FAR § 28.203-3, including a recorded property lien executed in favor of the government; an original certificate of title or an original title insurance policy demonstrating fee simple title vested in the surety (as well as any recorded encumbrances against the property); and a copy of either all current real estate tax assessments for the property or a certified appraisal conducted under the Uniform Standards of Professional Appraisal Practice. With the letter, the contracting officer included a copy of the relevant bid bond regulations set forth at FAR Subpart 28.2, and advised Johnson to submit its second BAFO and a revised bid bond by September 15.

On September 13, Johnson submitted an unrevised second BAFO as well as an unrevised bid bond. However, included with its submission was a letter written by Mr. DeSanti, as president of Imperial Surety, which advised the contracting officer that, contrary to her interpretation, Johnson's submitted bid bond "does not list Imperial . . . as Surety" [emphasis in original] and that "[t]here is no indication in any of the [SF 24] documents . . . that Imperial . . . is purporting to act as a Surety, either corporate or individual." Mr. DeSanti went on to explain that Imperial's role was strictly limited to executing the SF 24 as an authorized representative--"attorney-in-fact"--for Mr. Faber, who intended to secure the bid bond with real property assets. According to Mr. DeSanti, his signature in the first individual surety block of the SF 24 was "superfluous." To demonstrate the adequacy of the proffered real property as security for the bid bond, Mr. DeSanti provided a "Commitment for Title Insurance" document issued by a title insurance company; an "AFFIDAVIT OF INDIVIDUAL

¹Under FAR § 28.202, "Acceptability of corporate sureties," all corporate sureties offered for bonds furnished with contracts to be performed in the United States must appear on the list contained in Treasury Circular 570. See Envirotox Technologies, Inc., B-250091, Sept. 17, 1992, 92-2 CPD ¶ 186.

SURETY" (SF 23) executed by Mr. Faber; a real estate property lien referencing this RFP and drafted to benefit the government; and a property appraisal report which indicated an estimated value for the property in the amount of \$4,250,000.

After reviewing this documentation, the contracting officer, in conjunction with other agency contracting and legal personnel, determined that Johnson's bid bond was still inadequate. First, the VA determined that notwithstanding the explanation by Imperial, the legal identity of the exact surety was "clouded" on the face of the SF 24 Johnson submitted. Next, the agency determined that the accompanying power of attorney was not properly executed so that Imperial's ability to obligate Mr. Faber as an individual surety was similarly questionable. Additionally, after investigating the ownership of the property offered to secure the surety obligation with the Maricopa County, Florida offices (where the real property is located), the agency found Mr. Faber to be nonresponsible as an individual surety since the county records indicated that Mr. Faber was not the owner of the proposed collateral property. Finally, the agency determined the real property appraisal to be deficient. While the contracting officer's September 7 request for a second BAFO had specifically advised Johnson that "[t]he VA will not accept appraisals from Mr. Joe B. Hunt"--apparently, because this individual's appraisal reports are unreliable²--Johnson's submitted appraisal was nevertheless prepared by this individual. Moreover, as discussed below, the VA determined that instead of the \$4,250,000 appraisal figure which Johnson relied on to demonstrate the value of the real estate, in fact the correct value estimate for the property was \$2,600,000. After comparing this amount--\$2,600,000--with the identified property encumbrances set forth in the submitted "Commitment for Title Insurance" document--an amount totalling \$3,189,244--the contracting officer concluded that Mr. Faber had pledged inadequate assets to secure the bid bond.³ Consequently, as a result of these bid bond deficiencies, the contracting officer rejected Johnson's offer.

²According to the VA, the agency does not accept appraisals from Mr. Hunt since this individual has furnished unreliable property appraisals in the past. For example, the VA reports that Mr. Hunt provided appraisals on identical property to the United States Air Force, Kirkland Air Force Base, and the VA, both dated the same day, but describing the identical property differently.

³A contract guarantee amount of approximately \$560,000 was required.

On October 1, the contracting officer awarded the contract to the remaining offeror--American Telecom Corporation; on October 5, after receiving the agency's notice of contract award, Johnson filed this protest with our Office.

PROTESTER'S CONTENTIONS

In its protest, Johnson first argues that, contrary to the agency's assertions, the identity of Mr. Faber as the individual surety for Johnson's offer was patently clear from the face of its SF 24 and accompanying power of attorney document. Johnson thus contends that its bond was improperly rejected as ambiguous. Johnson also argues that the agency unreasonably found the pledged bid bond assets to be inadequate. As explained below, we deny the protest.

DISCUSSION

Bid bonds are a form of contract guarantee designed to protect the government's interest in the event of a bidder's default; that is, if a contractor fails to honor its contract in any respect, the bid bond secures a surety's liability for all reprourement costs. See N.G. Simonowich, 70 Comp. Gen. 28 (1990), 90-2 CPD ¶ 298. The determinative question as to the acceptability of a bid bond is whether the bid documents establish that the bond is enforceable against the surety should the contractor fail to meet its obligations. See A. W. and Assocs., Inc., 69 Comp. Gen. 737 (1990), 90-2 CPD ¶ 254; Vista Contracting, Inc., B-255267, Jan. 7, 1994, 94-1 CPD ¶ ____.

A required bid bond is a material condition of a solicitation. As such, in the case of sealed bid procurements, when a bidder submits a defective bid bond, the bid itself is rendered defective and must be rejected as nonresponsive. See FAR § 28.101-4(a); Vista Contracting Inc., supra. In the case of a negotiated procurement, such as the instant RFP, when an offeror in the competitive range submits a defective bid bond, FAR § 28.101-4(b) requires the agency to identify the bid bond deficiency through discussions and give the offeror an opportunity to correct the deficiency. See Norse, Inc., B-233534, Mar. 22, 1989, 89-1 CPD ¶ 293.

FAR § 28.203(a) requires contracting officers to determine the acceptability of individuals proposed as sureties and whether the surety's pledged assets are sufficient to cover the bid bond. Where, as here, a bid bond is secured by an interest in real property, the FAR provides that real estate will be accepted at 100 percent of the most current tax assessment value (exclusive of encumbrances) or 75 percent of the property's encumbered market value provided a

current, certified appraisal is furnished. FAR § 28.203-2(b)(4). We will not disturb an agency's determination of the adequacy of a surety's pledged assets unless it is shown to be unreasonable. Gulf & Texas Trading Co., B-253991.2, Jan. 24, 1994, 94-1 CPD ¶ ____; Eastern Maintenance Servs., Inc., B-220395, Feb. 3, 1986, 86-1 CPD ¶ 117.

In this case, we find the agency's determination that Mr. Faber proposed insufficient assets and was therefore a nonresponsible surety to be unobjectionable.

First, there was no evidence in the record before the contracting officer that Mr. Faber owns any of the property proposed to secure the bid bond obligation. According to the VA, the Maricopa County land records indicate that despite Mr. Faber's representation that he owns the identified property, in fact other entities own the commercial office buildings on the property. Additionally, the Maricopa County tax records show that another entity--not Mr. Faber--is the taxpayer for the land.

Further, we agree with the agency that the proffered "Commitment for Title Insurance" document is not a reasonable substitute for a certificate of title or an actual title insurance policy as this document in no way establishes that Mr. Faber holds a vested interest in the land. Rather, at best, this document indicates that, if he obtains vested title in the land, Mr. Faber intends to contract with the identified company for title insurance on that property.

In its protest, Johnson submitted a warranty deed and a quit-claim deed which purports to demonstrate full ownership of the Florida property by Mr. Faber. This evidence should have been submitted to the VA on September 13, in response to the agency's second BAFO request; an agency is not required to delay an award unreasonably to allow a bidder to show that it is responsible. See Astro Painting Co., B-247922.2, June 19, 1992, 92-1 CPD ¶ 535. In any event, even if we were to assume that Mr. Faber in fact holds vested title in the property, for the reasons discussed below, we conclude that the property's value is insufficient to guarantee the 20 percent bid bond obligation required here.

The submitted property appraisal presented by Mr. Hunt appears unreasonably inflated. An independent inquiry conducted by the VA reveals that the Maricopa County tax assessed value of the property, \$959,919, is far less than the alleged \$4,250,000 market value appraisal attested to by Mr. Hunt. The agency reports that while tax assessed land value is generally less than current market value, the unusually large difference in this case raises serious

concerns as to the validity of Mr. Hunt's appraisal data. The outstanding liens and other recorded encumbrances for this property also far exceed the Maricopa County tax assessed value.

The agency also reports that it considers the \$4,250,000 market value appraisal to be an unreasonable estimate both because this figure was calculated by an individual who has provided inaccurate, unreliable appraisals in the past, and because the \$4,250,000 value was deduced by means of a "Value by Income Approach" analysis. According to the VA, the government's interest in the proffered property is its current sales value, less any encumbrances--and not its income value.¹ Since the property's encumbrances--\$3,189,244, according to Johnson's title insurance submission--far exceed the sales value of the land--\$2,600,000--we find the agency's determination that this collateral constitutes insufficient security for the submitted bid bond to be reasonable.

In summary, the VA's rejection of Johnson's submitted bid bond is reasonable, especially in light of Johnson's failure to counter any of the agency's explanations.² See Atmospheric Research Sys., Inc., B-240187, Oct. 26, 1990, 90-2 CPD ¶ 338 (contention that agency improperly evaluated protester's technical proposal is denied where record indicates that agency evaluation was reasonable and in accordance with stated evaluation criteria, and where protester fails to rebut or reply to any of the agency's detailed responses to the evaluation challenge); Lucas Place, Ltd., B-238008; B-238008.2, Apr. 18, 1990, 90-1 CPD ¶ 398, aff'd, B-238008.3, Sept. 4, 1990, 90-2 CPD ¶ 180 (agency cost estimate provided in response to protest should be accepted where protester fails to rebut the estimate, despite opportunity to do so). The contracting officer carefully detailed the deficiencies in Johnson's submitted bid bond and properly offered Johnson an additional opportunity to resolve its bid bond deficiencies. Nevertheless, Johnson failed to remedy the noted deficiencies and, in fact, proceeded to provide an appraisal from a source which the agency had explicitly advised would be unacceptable. While an agency generally should make

¹That is, if Johnson were to default in its contractual obligations, the VA would not want to continue managing the Faber property for its income, but instead would sell the land in order to immediately cover all procurement expenses.

²Instead of commenting on the agency report, Johnson merely requested that the protest be decided on the existing record.

reasonable efforts to obtain additional documentation regarding an individual surety's acceptability, it is not required to wait an unreasonable amount of time to allow a contractor to demonstrate acceptability. See Pamfilis Painting, Inc., B-247922, June 15, 1992, 92-1 CPD ¶ 521. Under these circumstances, given the reasoned, unrebutted explanation from the agency, we find the VA's determination that Johnson's bid bond was deficient and the agency's subsequent rejection of Johnson's proposal to be proper.

The protest is denied.

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for Robert P. Murphy
Acting General Counsel